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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 285

THE FEDERAL BROADCASTING SYSTEM, INC., *Petitioner*,

v.

FEDERAL COMMUNICATIONS COMMISSION AND FLOWER CITY TELEVISION CORPORATION, *Respondents*.

REPLY BRIEF FOR PETITIONER

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PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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REPLY BRIEF FOR PETITIONER

The points raised by respondents in their briefs in opposition are answered in the petition. However, some further comment is required because of several statements in the briefs of respondents.

1. The briefs in opposition accuse petitioner of undue dilatoriness in making its commitment to divest its Rochester radio station, and Flower City Television Corporation ("Flower City") cites certain provisions of the Commission's rules in support of its contention (Flower City Br., p. 10). What the briefs in opposi-

tion fail to recognize, however, is that petitioner, in making its commitment to divest during the 1967 oral argument before the Commission, was affirmatively following the particular procedure specified by the Commission in this particular case. As noted in the petition (pp. 7-8, 19-20), the Commission ordered the 1967 oral argument in order to permit the parties "to address themselves to the remaining issues in this proceeding," since "a number of events have occurred since that date [November 2, 1964, date of the first oral argument] which may have a bearing upon the determination to be made herein." The revisions brought about by the *Policy Statement on Comparative Broadcast Hearings,* 1 F.C.C. 2d 393 (1965), in the significance of the diversification criterion was plainly one of the "remaining issues" to be addressed. Under the circumstances, 47 C.F.R. §§ 1.513 and 1.522(b) are inapposite.*

2. Flower City (Br., p. 11) makes much of the fact that the Commission, in its order denying reconsideration of its final decision, rejected a petition for leave to amend filed by one of the applicants after the Commission's final decision. However, whatever the Commission might say in an order denying reconsideration

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* Flower City's point that attorneys ordinarily may not sign applications or amendments to applications on behalf of applicants is inapposite for a further reason. Mr. Gordon P. Brown, president of petitioner, was personally present at the May, 1967, oral argument and personally directed the then counsel for petitioner to commit petitioner to dispose of its radio station.

On its face, Section 1.258 of the Commission's rules (47 C.F.R. § 1.258), cited by Flower City (Br., p. 10), is irrelevant. That section deals with the closing of a hearing record, and not with the supplementing of a hearing record after it has been formally closed.

in an attempt to rectify to the greatest extent possible any errors it may have made in giving weight to selected post-record changes while ignoring other equally significant post-record changes, the fact remains that the Commission could not have rendered the decision it did without having given decisional significance to certain post-record changes while failing and refusing to consider petitioner's commitment to dispose of its Rochester radio station. In particular, the Commission could not have ranked Star Television, Inc., equal to all of the other applicants except petitioner with respect to the diversification factor without relying upon certain post-record changes (Petition, p. 21). In any event, as noted above and as fully discussed in the petition, petitioner's statement at oral argument concerning the disposal of its Rochester radio station was not a mere attempt to improve its comparative position vis-a-vis the other applicants, as contended in the briefs in opposition, but rather was petitioner's response to the Commission's express invitation to address itself to the "remaining issues" in the proceeding, one of the most important of which was the change brought about by the *Policy Statement* in the preeminence of the diversification factor.

3. The Solicitor General misconstrues petitioner's position concerning the changes wrought by the *Policy Statement* in the significance of the diversification criterion (S. G. Br., p. 10). The petition shows on its face (pp. 17-18) that petitioner is well aware of the fact that the Commission considered diversification as one of the pertinent criteria in broadcast proceedings prior to the issuance of the *Policy Statement*. It is respectfully submitted that it is the Solicitor General, not the petitioner, who has misapprehended the

significance of the Commission's action taken in the *Policy Statement*. *Compare WHDH, Inc.*, 33 F.C.C. 449, 453 (1962), *with WHDH, Inc.*, 16 F.C.C. 2d 1, 12 (1969) (and see Petition, pp. 17-18 & n. 21).

CONCLUSION

For the foregoing reasons and the reasons set forth in the petition, a writ of certiorari should issue, the decision below should be reversed summarily, and the case remanded with directions that the Commission reconsider its decision in light of petitioner's commitment to dispose of its existing broadcast interests.

Respectfully submitted,

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